

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:17-CR-191

v.

HON. GORDON J. QUIST

ERNESTO McKINNEY,

Defendant.

**ORDER DENYING DEFENDANT’S MOTION
TO SUPPRESS AND FOR A *FRANKS* HEARING**

Defendant, Ernesto McKinney, has been charged in a four-count indictment with conspiracy to distribute and possess with intent to deliver 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii); possession with intent to deliver 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), and 2; possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924() (1)(A)(i) and 21 U.S.C. § 841(a)(1); and felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). McKinney moves to suppress the results of a search of 1824 Clearbrook Street, S.E., Grand Rapids, Michigan, and for a *Franks* hearing,¹ on the ground that the affiant who prepared the search warrant affidavit intentionally or recklessly included false statements in the affidavit.

Because McKinney fails to make a plausible showing that he has standing to raise a Fourth Amendment challenge, the Court will deny McKinney’s request for a *Franks* hearing. *See United States v. Mastromatteo*, 538 F.3d 535, 544 (6th Cir. 2008) (“Determining that a defendant has Fourth Amendment standing is a prerequisite to granting a motion for a *Franks* hearing.”). Moreover, even

¹*Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978).

if McKinney could show that he had a legitimate expectation of privacy, he fails to “provide a substantial preliminary showing that a false statement was made either knowingly or intentionally, or with reckless disregard for the truth,” *id.* at 545, to warrant a *Franks* hearing.

McKinney was previously convicted in this Court of drug- and gun-related offenses and was on supervised release during 2017. *United States v. McKinney*, No. 1:03-CR-203-04 (W.D. Mich.). On August 15, 2017, McKinney was arrested at his residence at 2513 Normandy Drive S.E., Apartment #203, Grand Rapids, Michigan, for allegedly violating conditions of his supervised release, specifically, possession and use of cocaine. (Case No. 1:03-CR-203-04, ECF Nos. 1124–25.) McKinney was remanded to the United States Marshal’s Service and lodged in the Newaygo County Jail. (ECF No. 41 at PageID.84.)

While at the Newaygo County Jail, McKinney made a series of telephone calls to Amber Harris, McKinney’s then-girlfriend. The Newaygo County Jail advises inmates who make calls from the facility that all calls are recorded. (*Id.* at PageID.85.) During these conversations, McKinney instructed Harris to retrieve certain objects from his vehicle and his apartment, which, from the context of the conversation, appeared to include firearms and drugs. In a conversation on August 16, 2017, Harris told McKinney that she had removed “everything that [McKinney] could possibly think ‘of value’ from [McKinney’s] apartment and that it [was] currently under her bed.” (*Id.*) At the time, Harris lived with her parents at 1824 Clearbrook St. S.E. In a separate telephone conversation a few minutes later, McKinney spoke of “a black bag and three of them other things,” and told Harris, ““Don’t ever tell nobody about my bag, no matter what happens don’t tell nobody.”” (*Id.* at PageID.86.) Harris explained that she had removed the items and placed them under her bed because Hollis, an associate of McKinney, told Harris that someone might break into McKinney’s apartment and steal McKinney’s property. (*Id.*)

Based, in part, on McKinney's conversations with Harris from the Newaygo County Jail, Martin Albert of the Kent County Sheriff's Office obtained a warrant to search 1824 Clearbrook St., S.E. During the search, officers found a black leather bag under Harris's bed containing cocaine and loaded firearms. (ECF No. 45 at PageID.101.) McKinney argues that the evidence obtained during the search must be suppressed because the contents of the audio tapes of McKinney's conversations with Harris do not support Detective Albert's conclusions regarding these conversations in his affidavit.

As noted above, a defendant must demonstrate Fourth Amendment standing to be entitled to a *Franks* hearing.² To establish standing, McKinney must show "that he had a legitimate expectation of privacy in the area searched or items seized." *United States v. Mathis*, 738 F.3d 719, 729 (6th Cir. 2013). "In determining whether an individual has a legitimate expectation of privacy in a particular area searched, [the Sixth Circuit] considers (1) whether the defendant exhibited an actual subjective expectation of privacy, and (2) whether the defendant's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.'" *United States v. Gillis*, 358 F.3d 386, 391 (6th Cir. 2004) (quoting *United States v. Knox*, 839 F.2d 285, 293 (6th Cir. 1988)). A person need not own or lease the premises in order to have an expectation of privacy for purposes of the Fourth Amendment. A person's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Minnesota v. Olson*, 495 U.S. 91, 96–97, 110 S. Ct. 1684, 1688 (1990). Even a short stay as a guest

²Although courts routinely refer to Fourth Amendment "standing," the Supreme Court has noted that standing—or the requirement that the defendant have a reasonable expectation of privacy—"is not distinct from the merits and 'is more properly subsumed under substantive Fourth Amendment doctrine.'" *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018) (quoting *Rakas v. Illinois*, 439 U.S. 128, 139, 99 S. Ct. 421, 428 (1978)). In *Byrd* the Court explained that "[t]he concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." *Id.* As such, the Court refers to standing as part of its Fourth Amendment analysis.

is enough to create a an expectation of privacy because temporary “shelter in another’s home . . . provides [the guest] with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.” *Id.* at 99, 110 S. Ct. at 1689.

McKinney does not argue that he had a legitimate expectation of privacy as to 1824 Clearbrook S.E. Nor could he. He did not own the property, did not stay there—even overnight—and in fact had never been inside the property. His only connection with the property—irrelevant for Fourth Amendment purposes—is that Harris, his girlfriend at the time, lived there with her parents. McKinney argues, however, that he owned the black bag and its contents and, therefore, has standing to challenge the warrant affidavit. As support for his claim of standing, McKinney cites *United States v. Waller*, 426 F.3d 838 (6th Cir. 2005), which, McKinney claims, “is on all fours with this case.” (ECF No. 45 at PageID.101.)

Contrary to McKinney’s assertion, the facts of the instant case differ markedly from those in *Waller*. In *Waller*, after being forced to leave his residence, Waller obtained permission from his friend, Howard, to store his personal belongings in Howard’s one-bedroom apartment, in which Howard resided with his girlfriend, Frazier. Waller stored his belongings—a luggage bag, clothes, and some food—in the living room, bedroom, or bathroom closets. Although Waller did not sleep at Howard’s apartment, he ate, showered, and changed his clothes there. *Id.* at 842. Neither Howard nor Frazier knew what Waller had in his luggage or garbage bags because they did not look inside the luggage or the bags. The court concluded that Waller had an actual expectation of privacy in his luggage: he told neither Howard nor Frazier what was in his luggage, he did not give them permission to look inside it, they did not look inside it because they thought it contained his personal property, and Waller “left the bag zipped, closed, and stored in the bedroom closet of the apartment.” *Id.* at 844. The court further found that Waller’s expectation was reasonable because

Waller was using Howard's apartment for showering, changing clothes, and storing his belongings and had placed some of his personal items in the luggage, which was zipped closed and stored in the bedroom closet of the apartment. The court concluded that "Waller's expectation that his luggage would not be subject to '[p]hysically invasive inspection' was reasonable." *Id.* (quoting *Bond v. United States*, 529 U.S. 334, 337, 120 S. Ct. 1462, 1464 (2000)) (alteration in original).

In contrast to *Waller*, McKinney did not have an actual expectation of privacy in the closed bag. While McKinney undoubtedly did not want law enforcement officers to find his contraband (guns and drugs), he did not place the contraband in the black bag, did not remove it from his apartment, and did not hide it under Harris's bed in her parents' home. In fact, Harris, believing that someone might break into McKinney's apartment and steal his property, took it upon herself to safeguard and hide the contraband under her bed in her parents' house—all without input or direction from McKinney. Waller, on the other hand, packed his own bag, made arrangements with Howard to store personal property at Howard's apartment, took his bag and other belongings to Howard's apartment, and actually maintained a presence at Howard's apartment. McKinney did none of these things.

Even if McKinney had a subjective expectation of privacy in the contents of his bag, such expectation was not reasonable under the circumstances. McKinney did not ask Harris to hide his bag under her bed; she made that decision on her own. More importantly, McKinney does not claim that either he or Harris had permission from the property owners—Harris's parents—to store McKinney's personal effects inside their residence. *See United States v. Kellogg*, 202 F. App'x 96, 101 (6th Cir. 2006) (concluding that the defendant lacked a reasonable expectation that his container stored in another's barn would be free from invasion or inspection because the defendant "did not ask to live in the barn, to sleep there or even to store anything in the barn"); *but see United States*

v. Childs, No. 06-10330-DPW, 2008 WL 941779, at *7 (D. Mass. Apr. 4, 2008) (“Generally, the idea that a person has a expectation of privacy in a closed, personal container left in another person’s home with permission of the permanent resident is reasonable.”) (citing *Waller*).

Even if McKinney could establish standing, *i.e.*, a reasonable expectation that his property stored in Harris’s parents house would not be inspected by anyone without McKinney’s consent, McKinney fails to make a “substantial preliminary showing” that Detective Albert, “either knowingly and intentionally or with reckless disregard for the truth . . . [included] a false statement in the affidavit.” *United States v. Brown*, 732 F.3d 569, 575 (6th Cir. 2013). McKinney does not identify with any specificity, either in his motion or affidavit, a statement he contends was false. McKinney references statements by Detective Albert on pages 2–4 of his affidavit, but he does not identify what was false and why it was so. Instead, McKinney and his counsel merely state that “the tapes do not purport what was claimed to be the contents of the conversation and that what was purported by the Defendant to the listener, and there may well have been an intentional misrepresentation or representations made with a reckless disregard fo the truth.” (ECF No. 41 at PageID.76–77; *see id.* at PageID.90 (“The calls are not and should not be construed to stand for what Officer Martin Albert stated in his Affidavit . . .”).) Although McKinney’s argument is not entirely clear, it appears that McKinney does not dispute that he made statements on the tapes that Detective Albert interpreted as code for instructions to Harris for handling McKinney’s drug transactions and concealing his firearms and drugs, but, McKinney contends, Detective Albert either misconstrued or took McKinney’s statements out of context; in other words, “I really meant something else.”

A defendant who challenges the veracity of statements made in an affidavit that formed the basis for a warrant has a heavy burden. His allegations must be more than conclusory. He must point to specific false statements that he claims were made intentionally or with reckless disregard for the truth. He must accompany his allegations with an offer of proof.

United States v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990) (citations omitted). McKinney has not met this burden.

In sum, because McKinney lacks standing to assert a Fourth Amendment violation and has failed to make a substantial preliminary showing required to warrant a *Franks* hearing, he is not entitled to the relief he seeks.

Therefore,

IT IS HEREBY ORDERED that Defendant's Motion to Suppress and for a *Franks* Hearing (ECF No. 41) is **DENIED**.

Dated: November 30, 2018

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE